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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 565.

WRIGHT & TAYLOR, INC., *Petitioner,*

vs.

ROBERT H. LUCAS, Collector of Internal Revenue for the District of Kentucky, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PETITIONER.

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BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the United States Circuit Court of Appeals (R. '42) was filed November 10, 1930, and

has not as yet been reported. The opinion of the United States District Court for the Western District of Kentucky (R. 42) is reported in 34 Fed. (2d) 328.

Jurisdiction.

The judgment of the Court of Appeals for the Sixth Circuit was filed on November 10, 1930 (R. 25). A petition for the writ of certiorari to review this judgment was filed on November 28, 1930, and was granted on December 8, 1930, under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. 43 Stat. 938.

Questions Presented.

This case presents the question whether the facts in this case bring it within the terms of Section 611 of the Revenue Act of 1928, whether that Section was available to the respondent as a defense to petitioner's suit, and whether said Section, if intended to apply to cases such as the case at bar, violates the Fifth Amendment to the Constitution of the United States.

Statutes Involved.

Sections 607, 611 and 612, of the Revenue Act of 1928, C. 852, 45 Stat. 791, provide as follows:

> "SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an over-

payment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Sec. 607 relating to payments made after the expiration of the period of limitation on assessment and collection."

"SEC. 612. REPEAL OF SECTION 1106 (a) OF 1926 ACT. Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926."

Statement of the Facts.

The facts were stipulated (R. 21-24) and were specially found by the District Court (R. 34, 36). They show that the petitioner on June 17, 1919, made its income tax return for the fiscal year ended June 30, 1918 (R. 22), and, upon the assessment of the tax shown to be due and of an additional tax, disputed the correctness of the assessments by filing claims in abatement on September 15, 1919 (R. 23). On December 13, 1923, the petitioner filed a "waiver" which had the effect of extending the five year statutory period for collection* of this tax from June 17, 1924, to December 13, 1924 (R. 24). Neither the Commissioner nor the

*While the stipulation says that the "waiver" was of limitations on assessment, it was set out and admitted in the pleadings that the waiver also referred to collections as well as assessments (R. 3, 19), and was found so to be by the trial court, Finding of fact V (R. 35).

respondent took any steps toward collecting the unpaid assessments until September 8, 1925, when the respondent by threats of distraint forced the petitioner to pay the taxes assessed against it (R. 24).

On September 30, 1925, the petitioner filed a claim for refund of the taxes so collected (R. 24) contesting the amount of the tax on the merits, and on the further ground that the statutory period for collection had expired (R. 5-7). No action being taken by the Commissioner upon this refund claim, a suit was filed on April 14, 1927, in the District Court for the Western District of Kentucky (R. 1) in which the dispute as to the merits of the tax was abandoned and the suit was based on the broad ground that taxes had been illegally collected after the statutory period prescribed therefor (R. 1-4, 8-10) and this ground was sufficient to sustain the action. The respondent failed to answer until April 8, 1929 (R. 16-20) at which time he raised the defense that Section 611 of the Revenue Act of 1928 barred recovery. (R. 20) This contention was sustained by the District Court (R. 25) is an opinion rendered July 26, 1929, 34 Fed. (2d) 328.

The Circuit Court of Appeals in affirming the District Court recognized in its opinion (R. 42) that, had the case been decided prior to the passage of the Revenue Act of 1928, the petitioner would have been entitled to judgment against the respondent who had no authority to receive the money at the time of collection, the tax claimed having been barred by the statute of limitations of five years, found in Section 250(d) of the Revenue Act of 1921, and the liability discharged, citing Section 1106 (a), of the Revenue Act of 1926, 44 Stat. Part 2, 113. The Court concluded, however, that Section 607, 611 and 612, of

the Revenue Act of 1928, gave the respondent a valid defense and entered judgment (R. 42) affirming the decision of the District Court.

Specification of Errors.

The following errors were specified in the petition. The court erred:

1. In holding that Section 611 of the Revenue Act of 1928 applies to the facts in this case, notwithstanding the absence of any showing that the claims in abatement were influential in staying the Collector from enforcing payment.

2. In holding that Section 611 applies not only to purely administrative credits and refunds of the type mentioned in Section 607, but that it was also intended to furnish a defense in law suits against Collectors.

3. In holding that Section 611 is to be given retroactive affect, and is not holding that the retroactive effect, if any, is limited to voluntary payments of barred tax.

4. In holding that Section 611 shows an intention to revive a tax liability expressly discharged by law (in addition to being merely barred) and that, so construed, there is no violation of the Fifth Amendment to the Constitution.

5. In affirming the decision of the District Court and failing to direct that judgment be entered for this petitioner.

Summary of Argument.

Section 611 applies only to cases where collection has been stayed by abatement claims. The pleadings in the case raise the issue whether petitioner's abatement claims had any relation to the delay in collection. No proof of such relationship was made to sustain the respondent's burden of proving the truth of his affirmative plea. A waiver was given, which put the Collector on notice to collect, and precluded any inference that further delay was due to the abatement claims.

Section 611 is, by its terms, dependent for effect upon Section 607 of the same Act, and, since Section 607 is plainly limited to administrative action, the subsidiary section should have the same effect. In referring to "overpayments" neither of these sections meant to bar recoveries in the courts. This is shown by the reasons which actuated the reference to overpayments.

These sections by their terms show no purpose to affect a taxpayer's right to recover collections illegally enforced prior to their enactment, and ought not to be construed to have that effect.

When taxes have been barred by limitation they become extinguished. The effect given to the section by the court below is to recreate liabilities already discharged, or to confiscate money of the taxpayer which chanced to be in the Government's possession when these sections were enacted. Either of these actions would be beyond the power of Congress. If so construed, the section also involves unreasonable classification, so as to violate the Constitution.

Argument.

The general policy of the recent revenue acts is that after a certain fixed time taxpayers shall be safe from tax demands. In the case at bar collection was had after the limitation period prescribed therefor (section 250 (d) Revenue Act of 1921), and the courts below recognized that prior to the enactment of section 611 of the Revenue Act of 1928 this petitioner had the right to recover the amounts exacted from it.

Section 611 provides for an exception to the general limitation policy. The parties differ as to how radical that exception was meant to be. Payments by taxpayers after the statute has run in the taxpayer's favor fall into two classes, (1) those where the taxpayer voluntarily complies with the collector's belated request or demand and (2) cases where the taxpayer complies with a belated demand only when compelled to do so by duress. The Government, claiming that the exception goes to the full length of affecting both of these classes of payments, is in the position of contending that where a collector has disobeyed the law which forbade him to collect and has enforced payment from a taxpayer who was insisting on his rights, the taxpayer was intended to be without any redress if it happened that, in contesting the accuracy of the Government's figures he happened to choose the method of filing a claim in abatement, and if, in the natural course, such filing caused a stay of collection. The Government thus claims that as regards a particular class of taxpayers, whose procedure was not only legal when adopted but was actually invited by the Government's own regulations, Congress intended them to be without redress after

the collector's illegal act. We submit that the words of the section do not support that extreme contention.

I.

There was no evidence to support the respondent's affirmative plea that collection was stayed.

Section 611 was improperly applied to this case (A) because there was no evidence to support respondents' affirmative plea that collection was stayed, even if it be conceded that cases of voluntary administrative delay involve a stayed collection, and (B) because Section 611 contemplates some act of a taxpayer which legally or morally tied the hands of the respondent, and nothing which petitioner did had this effect.

(A)—Section 611, the title of which is "Collection Stayed *By* Claim in Abatement", applies here only:

> " * * * if a claim in abatement was filed, with or without bond, and if the payment of any part thereof was stayed * * * "

The respondent, by an affirmative plea (R. 20) asserted in the trial court that that petitioner, by filing claims in abatement, stayed collection of the taxes assessed against it. Petitioner denied this averment (R. 21).

The facts, which were stipulatted (R. 21), showed only that in June, 1919, petitioner filed its final return for the fiscal year ended June 30, 1918; that the tax shown thereon to be due, and additional taxes, were assessed against it in August and September, 1919; that on December 13, 1923, which was within seven months of the end of the limitation period for collec-

tion (June 17, 1924), petitioner filed a "waiver" extending the time for assessment and collection to December 13, 1924, and that no steps toward collection were taken until September 8, 1925, when collection was enforced by duress. We submit that this inference was unwarranted, as a matter of law. Since the collection did not follow rejection or other disposal of petitioner's claims in abatement, and since the waiver put a definite limit upon the time for collection, any failure to act within the period was chargeable to the respondent rather than to any act of the petitioner, unless, as does not appear, some further inducement to delay was given.

the court inferred from these facts that collection had been stayed by the claims.

The Court seems to have assumed that, since it was the duty of the respondent to collect promptly, it is to be inferred that the specific cause of his failure was the abatement claims.

The claims were filed almost six years before collection was had, and, so far as appears, were unacted upon. Under these circumstances any relationship between the claims and the delayed collection can be arrived at only by supposition, and by disregarding the possibility that the delay in collection was due to mere oversight.

However, even if it be assumed that the respondent delayed collection after the abatement claims were filed, in order to permit action thereon, the filing of the waiver changed the situation. The effect of the waiver was to extend the time for collection. However, it did more. It was filed by the petitioner and must have shown a purpose upon its part to set a limit upon the period of delay in collection which it was seeking, or expected to receive. Any delay in collection thereafter, was more than was asked for, and should not now work harm to the petitioner.

With the period of limitations about to expire, the waiver was against the petitioner's interest, unless demanded as a condition to a further delay in collection. If the waiver was so demanded, it showed an election upon the part of the collector not to rely on the claims in abatement as a reason for not collecting. The respondent's failure to act within the time specified in the waiver, cannot be charged in any wise against the petitioner. The case is one of thousands in which collectors have not shown diligence.

The respondent Collector, rather than the petitioner, possessed the records and other information showing why the delay occurred, and suffers no hardship if required to prove that, of possible causes, the real cause was the abatement claims.

The express terms of Section 611 seem to require something more than a mere inference that a delay which followed the filing of a claim in abatement was due to or induced by such claim. Section 611, by its terms, relates only to cases where collection has been delayed until after the statutory period prescribed therefor. If, therefore, Congress had intended the presumption indulged in the case at bar, or if, as the Government contends in its brief in the case of *Graham & Foster v. Goodcell,* certiorari granted, Number 36, this Term (at page 21), Congress "knew the situation and legislated with reference to that situation," thereby rendering affirmative proof unnecessary, we submit that Congress would have inserted in the statute only the first of the two additional conditions prescribed. The two conditions limiting the application of Section 611 are "if a claim in abatement was filed *and if the collection of any part thereof was stayed.*" The decision below

and the interpretation urged by the Government would render the final condition surplusage.

(B)—We further submit that the term "stayed" as used in Section 611 contemplated something which either legally or morally tied the hands of the respondent, as was held in *United States v. Burden Smith and Co.*, 33 Fed. (2d) 229. Since nothing which petitioner did had such effect, the decision below was erroneous. The instances in which the word "stay" has been in reference to collections of income taxes, and cases where undertakings, other than bonds, have stayed collection, in connection with abatement claims, have been pointed out in other briefs now before this Court, and will not be here repeated. This is more fully stated in the brief of Counsel herein, as *amici curiae*, in *Graham and Foster v. Goodcell* (No. 36, present term), pages 5 and 6, also in the brief for petitioner in *Roy & Titcomb Inc. v. United States* (No. 412—this term), pages 37-41.

II.

Section 611 was not intended to apply to cases, such as the case at bar, where suit was pending before the Revenue Act of 1928 was enacted.

If Section 611 is to be given retroactive effect, it must be considered as operating more broadly than Section 607, of which it is, by its terms, merely a subsidiary. Section 607 provides that taxes which have been illegally collected, after the period of limitations:

> "*Shall* be considered an overpayment and *shall* be credited or refunded to the taxpayer, if claim therefor *is* filed within the period of limitations for filing such claim."

Section 611 provides that the payment made in the circumstances described therein

> "shall not be considered as an overpayment under the provisions of Section 607."

Taken together the two sections seem to provide merely that if a claim for refund is filed, based upon Section 607 (and hence is filed after the approval of the 1928 Act), such claim shall be allowed by the administrative authorities unless a situation described in Section 611 is found to exist, in which event the claim is to be disallowed.

However, even if, as is contended by the Government, the language employed in Section 607 relates to status and not to time, we submit that the facts in this case illustrate results of the sweeping application given by the courts below, which Congress did not intend Section 611 to produce.

Petitioner disputed the correctness of the Commissioner's assessments by filing claims in abatement (R. 23). The assessments were collected without disposal of these claims. A claim for refund was filed on the primary ground that collection was barred and illegal when had (R. 6-7, 24). Another ground was that the tax was not due. The Commissioner ignored the refund claim, and when time came to file suit, the issue as to the merits of the tax, which had never been decided, was abandoned, and suit was brought claiming a recovery on the then sufficient ground that collection was had after the tax had become barred (R. 1-4).

It would seem plain that Section 611 was not intended to penalize the abandonment of issues regard-

ing the merits of the tax, such abandonment having been safe and proper when made.

If Section 611 was intended to have any retroactive effect, we submit that it does not extend to cases such as this, where payment was forced, and especially where, as here, the taxpayers had taken steps to reclaim enforced payments of barred taxes long prior to the decision in the case of *Bowers* v. *New York and Albany Lighterage Company*, 273 U. S. 346, a case said by the Court below to have caused the enactment of Section 611.

While Section 611 refers to payments of barred taxes, whether made before or within one year after its enactment, the section does not specify whether the term "payment" includes enforced as well as voluntary payments. However, the section as originally drawn specifically authorized collection by distraint or suit, if begun within one year after its enactment. This provision was stricken out in conference (Senate Report No. 960, page 42, 70th Congress, First Session). The administrative officers have taken the position that the section does not authorize enforced future collections. Instructions to Collectors, Mim. 3660, Cumulative Bulletin VII-2, p. 82 (Prentice-Hall 1930 Federal Tax Service, page 19,344).

We submit, therefore, that, if Section 611 uses the term "payment" to refer only to voluntary payments made after its enactment, no sound basis exists for the application of the same term as applying to enforced payments exacted prior to its enactment.

III.

Section 611 applies to administrative credits and refunds, and was not intended to destroy causes of action in the courts for the recovery of barred collections.

Section 611 of the Revenue Act of 1928 by its terms merely provides that payments made under the conditions described therein "shall not be considered as an overpayment under the provisions of Section 607 relating to payments made after the expiration of the period of limitation on assessment and collection." Section 607 therefore must be examined.

Section 607 by its terms directs that, any tax assessed or paid after the expiration of the period of limitation on assessment and collection "shall be *considered* an overpayment and shall be credited or refunded to the taxpayer if claim therefo is filed within the period of limitation for filing such claim."

Since payments of the kind described include both payments which were never in fact due (true overpayments) and also taxes once due, but barred by limitation (not true overpayments), the reason for providing that they "shall be *considered* overpayments" must be found. This reason is to be found in events occurring prior to the enactment of Section 607.

It was apparently regarded as settled law that collections of barred taxes gave rise to a right of recovery, without any question as to whether the payment was truly an overpayment, until the Court of Claims, in the case of *Toxaway Mills* v. *United States*, 61 Ct. Cls. 363, (reversed on confession of error, 273 U. S. 781) held that where a tax was collected after the period for collection had expired, the taxpay*er could*

not recover for that reason alone, but must show further that he had in fact overpaid the tax on its merits. It further held that the running of the statute of limitations on collection did not operate to extinguish the liability but merely barred the remedy.

Congress, in drafting the Revenue Act of 1926, incorporated a special provision to counteract the effect of this decision. (See Report of Conference Committee House Report No. 356, 69th Congress, 1st Session, p. 55.) This provision is as follows:

> "Sec. 1106 (a). The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax."

This section, while disposing of the question as to whether the running of the period of limitation on collection extinguished the liability for the tax, gave rise to confusion by its provision that "no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax."

The provision referring to *credits and refunds,* was construed by certain taxpayers as barring recoveries in the Courts (a construction given by the Court below to similar provisions in Sections 607 and 611), and certain taxpayers brought suits to enjoin collections of barred taxes upon the theory that if collection was had, all remedies would be lost, and hence that the prohibition of Section 3224 Revised Statutes, against enjoining collection of taxes, did not apply. These suits were defended by government counsel, and re-

sulted in holdings that the prohibition against credits and refunds in Section 1106(a), applied only to administrative action by the Commissioner and did not bar recoveries in the Courts. (*Ellay Company* v. *Bowers*, 25 Fed. (2d) 637, certiorari denied 48 Sup. Ct. 601; *Thornhill Wagon Company* v. *Noel*, 17 Fed. (2d) 407; *Gove* v. *Nichols*, 23 Fed. (2d) 856.

The Court of Claims, in the case of *Adelaide F. Chapman* v. *United States*, 63 Ct. Cls. 424, construed Section 1106(a), Revenue Act of 1926, as preventing recoveries of barred taxes by suit unless the tax had been in fact overpaid. However, as before noted, the Solicitor General joined the taxpayer in opposing this construction of Section 1106(a) and, after the enactment of the Revenue Act of 1928 (in which Sections 607-612 were substituted for Section 1106(a), the case was reversed upon the motion of the Solicitor General. (278 U. S. 660.)

It is clear from what theretofore had transpired that Section 607, in declaring that payments of taxes after the statutory period therefor "shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim" was merely authorizing what Section 1106(a) had been held to prohibit, i.e., administrative credits or refunds by the Commissioner where barred collections had been made, even though there was no true "overpayment" involved. *This was the sole purpose of Section 607, which, like the Sections which preceded it relating to credits or refunds, had nothing to do with rights of action for repayments in the courts.*

The Court below concluded (Opinion, R. 44) that when Sections 607, 611 and 612 of the Revenue Act of

1928 are read together their evident purpose is to counteract the decision of this Court in the case of *Bowers* v. *New York & Albany Lighterage Company,* supra, and that these Sections were intended to prohibit not only administrative refunds, but recoveries in the courts.

In this we think the Court erred, since only Section 611 was enacted to meet situations resulting from the decision in the *Bowers* case, and this Section was by its terms made subsidiary to Section 607—a Section which was intended only to relate to administrative action. The Court in emphasizing that Section 611 provides that illegal "collections" in certain cases shall not be considered overpayments, and in reasoning that if there was no overpayment there could be no cause of action, apparently lost sight of the fact that it is illegal collections—a broader class than true "overpayments" on the merits—which are recoverable in the Courts. *Graham* v. *DuPont,* supra, *Bowers* v. *New York & Albany Lighterage Company,* supra, *Toxaway Miills* v. *United States,* 61 Ct. Cls. 363, reversed, 273 U. S. 781.

IV.

The Court below erred in holding that Section 611 shows an intention to revive a tax liability expressly discharged by law and that so construed there is no violation of the Fifth Amendment to the Constitution.

The court below recognized that Section 1106 (a) of the Revenue Act of 1926 discharged petitioner's liability for the tax, but concluded that Sections 607, 611 and 612 of the Revenue Act of 1928 operated to entitle the Government to keep the money illegally

exacted by the respondent, and to destroy petitioner's cause of action, which had accrued and been asserted in court at the time Section 611 was enacted. (Opinion R. 44).

If petitioner's liability for the sums involved as Federal income taxes had been discharged, the effect ascribed to Sections 607, 611 and 612 of the Revenue Act of 1928 must have been (a) to revive this tax liability; (b) to lay a new tax equal to the amount illegally collected; or (c) to direct arbitrarily that the monies wrongfully gotten by the Government, although no longer due as taxes, should be retained by it.

(a) The conclusion that liability was discharged, or extinguished, was clearly correct whether Section 1106 (a) be regarded as merely declaring the law as it formerly had been, or as operating for the first time with that effect. Nor is it material that collection in this case preceded the enactment of Section 1106 (a), for if the running of the time for collection barred the remedy only, liability continued and was extinguished when Section 1106 (a) came into effect. Such collection as was had was an illegal act, the moneys gotten were subject to the demands of the taxpayers, and could not validly be applied in satisfaction to the tax liability.

Since Section 612 of the Revenue Act of 1928 repealed Section 1106(a), as of February 26, 1926, (the date of its enactment) it may have been considered by the Court below that this repeal operated to revive all liabilities which said Section had declared were extinguished.

However, it seems most reasonable to conclude that the repeal of Section 1106(a) as of the date of its enactment and the substitution therefor of Sections 607 to 612 of the Revenue Act of 1928 was not for the pur-

pose of reviving barred liabilities but was for the purpose of clearing up misapprehensions which had existed as to the meaning of Section 1106(a) insofar as it seemingly prohibited administrative refunds of illegally collected taxes, unless it also appeared that taxpayers had overpaid the tax. This confusion has been discussed herein, ante, at pages 14, 16.

In addition it would seem clear that the revival of an extinquished liability, equally with the laying of a new tax, would be an act of such importance and hardship upon citizens as to require explicit and certain terms in its expression. Such certainty is wholly lacking in the Sections of the Revenue Act of 1928 referred to.

Numerous courts have been unable to find any purpose on the part of Congress to re-create discharged liabilities in the repeal by Section 612 of Section 1106 (a) of the Revenue Act of 1926. *Heiner* v. *Erie Coal & Coke Co.*, 42 Fed. (2d) 214, certiorari granted 1930, No. 508, October Term, 1930, *Wyman Partridge & Co.* v. *United States,* 41 Fed. (2d) 866, certiorari granted 1930, No. 416, October Term, 1930. *United States* v. *John Barth Company,* 27 Fed. (2d)782, reversed on another ground in 279 U. S. 370. *Wettengel* v. *Robinson,* 300 Penn. 355, 150 Atl. 658.

(b) Section 611 does not purport to lay a new tax. On the contrary, this Section and Section 607 each refer to taxes already imposed by law which have been ascertained in amount and assessed against the taxpayer. It can not, therefore, reasonably be said that Congress intended by these Sections to impose a new tax in the amount of the collections previously illegally had.

Nor does Section 611 seem to present a case where a tax is in effect laid retroactively by the ratification

of a collection previously and illegally made, as in *United States* v. *Heinszen & Co.*, 206 U. S. 370, first, because statutes which are intended to ratify illegal collections must do so in express terms, as in other cases where taxes are laid. *United States* v. *Heinszen & Co.*, supra; *Lincoln* v. *United States*, 197 U. S. 419; *DeLima* v. *Bidwell*, 182 U. S. 1. Section 611 does not expressly ratify any illegal collection, and such a ratification would have been impossible because, as heretofore shown, the taxes involved had been laid and had become discharged prior to the enactment of Section 611.

Similarly, Sections 607, 611 and 612 can scarcely be said to have repealed an existing statute of limitation, as in *Campbell* v. *Holt*, 115 U. S. 620, because they do not purport to do so and for the further reason that if liability had been discharged by Section 1106 (a) or under general principles of law, it would require more than the mere removal of a *defense* of the statute of limitations to strike down an existing cause of action.

The fact that the barring of Federal Income taxes by limitations upon collection give rise to common law rights of action against Collectors for money had and received, (Graham v. DuPont, supra, Bowers v. New York & Albany Lighterage Co., supra) would seem to confirm the conclusion that, even without the express provisions of Section 1106(a) of the Revenue Act of 1926, the expiration of the statutory period for the collection of assessed income taxes operated to discharge the liability therefor.

The Court, in the cases of *Danzer & Co.* v. *Gulf & Ship Island Co.*, 268 U. S. 633, 636; *Davis* v. *Mills*, 194 U. S. 451, and *The Harrisburg*, 119 U. S. 199, distinguished the earlier case of *Campbell* v. *Holt*, supra,

which involved the repeal of limitations upon the time for asserting common law liabilities, which applied "to the remedy only" and pointed out that other types of limitations "operate as a limitation upon *liability.*" Many cases were cited in which liabilities were created by statutes and limitations contained in the same or later statutes were held to bar not only the remedy but the liability itself. Income taxes are statutory liabilities, and the limitations upon the collection thereof contained in the same or later Revenue Act are clearly limitations which not only bar the Government's right to enforce collection, but extinguish the taxpayer's liability for the tax.

It would seem obvious that if the liability had been extinguished, it would require something more than a repeal of the statute of limitations to restore liability.

(c) It might be claimed that Section 611 directed the rentention by the government of all money illegally collected by duress, in the special circumstances described, even though all claim thereto as taxes had been extinguished before the money came into the possession of the Government. Such a direction, we submit, would so clearly be an unauthorized direction to confiscate private property as to be ascribed to Congress only when no other view of the statute was possible. As heretofore shown herein, Section 611 by its express terms applies only as a prohibition against administrative credits and refunds and leaves open in the courts all questions as to the right of the Government to retain barred taxes. We submit, therefore, that it should not be presumed that Congress, in enacting Section 611, intended to require the confiscation of property of taxpayers which had wrongfully come into its hands.

If it be assumed that Congress did intend, by Section 611, to bar recoveries in the courts of sums illegally collected from petitioners as taxes, under any of the theories hereinbefore discussed, we submit that said Section is unconstitutional and void because it authorizes the taking of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

The protection afforded citizens by the Fifth Amendment to the Constitution, against Federal statutes which have the effect of taking property without due process of law, includes protection against statutes which re-create or revive liabilities which have become extinguished through lapse of time. *Danzen & Co.* v. *Gulf and Ship Island R. R. Co.*, supra; *Davis* v. *Mills*, supra. This protection also exists against statutes which purport retroactively to create liabilities. *Forbes Pioneer Boat Line* v. *Everglades Drainage District*, 258 U. S. 336. These cases, it is true, relate to rights as between private parties, but the instant case, although pertaining to sums erroneously taken as Federal taxes is also one between private parties.

The suit in the case at bar is an action under the common law against the respondent in his individual capacity. *Smietanka* v. *Indiana Steel Company*, 257 U. S. 1; *Levy* v. *Wardell*, 258 U. S. 542. The action retains its common law basis, notwithstanding that the revenue laws prescribe conditions precedent to suit, and notwithstanding that, after judgment, the liability may be transferred to the United States. *Patton* v. *Brady*, 184 U. S. 608; *Sage* v. *United States*, 250 U. S. 33.

As thus viewed, the effect given to Section 611 by the Court below is to destroy a right of action which

petitioner had against the respondent as an individual. This plainly would be the taking of property without due process of law, and prohibited to the Congress by the Fifth Amendment.

If, however, the subject-matter of this suit is regarded as primarily Federal taxes and the Government as the real party in interest, the inquiry shifts to whether Section 611 violates the limitations, if any, upon the power of Congress to tax its citizens.

The power of Congress in this field is necessarily of the broadest scope, but is not unlimited. One of these limitations is that Congress must exercise its taxing power so as to produce results which conform to the purposes of taxation, and its enactments which go beyond this and are so arbitrary and discriminatory in operation as to amount to confiscation may not be sustained. *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1; *Nichols* v. *Coolidge,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142.

The Court below was of the opinion that Congress possessed the power to bar refunds of illegally collected taxes even though liability therefor had been discharged, where the discharge was not through payment, and stated as a reason therefor that unless this were so, certain taxpayers would escape their just share in the common burden of taxation (Opinion, R. 45, 46).

It seems probable that Congress, if it possessed the power to revive an extinguished tax in order to equalize the common burden of taxation, might do so as to *all* taxes laid and assessed, but not theretofore collected. In such cases it would be reasonable to retain all moneys illegally collected after the statutory period therefor and to require collection of all unpaid assess-

ments. That is not the situation created under Section 611, as construed by the Court below, or under any possible view of that section as a ratifying statute. Nor does Section 611 even operate to remove the benefit of the statute of limitations from all who had by their own acts "stayed" collections of the tax. Instead, only one out of five types of cases where collections have been "stayed" is reached by the section.

(1) Section 611 does not authorize the retention of moneys illegally collected where collection was stayed by claims for credit (G. C. M. 6296—Cumulative Bulletin VIII-35-4326).

(2) Section 611 does not authorize collections from those who stayed collections by abatement claims, but who had not been forced to pay prior to the enactment of the Revenue Act of 1928. (I. T. 3660—Cumulative Bulletin VII-2, p. 82.)

(3) Section 611 does not authorize collection or the retention of sums voluntarily paid after the statutory period for collection and more than one year after the Revenue Act of 1928 was passed, even though the collection was stayed by an abatement claim.

(4) Section 611 does not authorize collection to be made from those who stayed collection by claims in abatement, but who, prior to the Revenue Act of 1928, had recovered by administrative refunds, or suits in the courts, taxes illegally collected after the statutory period therefor.

(5) Section 611 applies only in cases where collection has been stayed by claims in abatement and where the money wrongfully collected after the liability for Federal taxes had been discharged was in the possession of Government agencies when the Revenue Act of 1928 was enacted, or was voluntarily paid into their hands within one year thereafter.

The application of Section 611 to this limited class, without any apparent reason for the classification, plainly results in the confiscation of private property and in the unreasonable exercise of the powers of taxation possessed by the Congress.

We submit that Section 611, as construed by the Court below, goes beyond the ordinary meaning of the terms employed therein, and is unconstitutional. If construed as relating only to administrative refunds and credits and not to actions in the courts, effect is given to the terms employed in their ordinary sense and meaning, and a result within the power of Congress to provide is reached.

Respectfully submitted,

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922 Southern Building,
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December 9, 1930.